

BOOK REVIEW

Drugs and the Law by M. R. Goode, (Research Paper No. 7, Royal Commission into the Non-Medical Use of Drugs, South Australia, 1979), pp. 198. ISBN 0 7243 5352 6.

The Australian legal fraternity has been surprisingly reluctant to delve into the intricacies and difficulties of the law relating to the non-medical use — or, in the view of some, abuse — of illicit drugs. Granted that this area of legal study and practice has blossomed only comparatively recently, it nevertheless is still the case that there has been a severe dearth of investigation of laws relating to drug offences in Australia.

This report by Matthew Goode, Lecturer in Criminal Law at Adelaide University, is an important step in a remedial process which is gradually beginning to unfold. The sudden rash of Royal Commissions in this area in the last two years, though somewhat affected by uninformed public prejudices, has at least engendered some debate in the area of drugs and the law. Goode's report, one of seven background reports prepared for the South Australian Royal Commission into the Non-Medical Use of Drugs, is commendably dispassionate and detached, and should stand as an important milestone in the education of Australian lawyers on the realities of drug usage and the involvement of the law. In essence, *Drugs and the Law* is a textbook of Australian drug laws, and their interpretation and application.

Goode is not frightened of controversy, and presents a damning indictment of the existing pattern of Australian drug laws, arguing that long established common law principles of civil rights and individual liberties are contravened almost as a matter of routine. Some of his more strident criticisms are as follows:

* In many instances in drug-related criminal litigation, the burden of proof with respect to a major issue is placed on the defendant, in direct contravention of the fundamental assumption that the accused is innocent until proven guilty.¹ For example, it is a common feature of Australian drug legislation that an accused found to have been in possession of a certain amount as specified of a proscribed drug will be deemed to have been in possession thereof for the purposes of trafficking.² This presumption stands 'until the contrary is proved'.³ As Goode indicates, the extent of the burden of proof which this 'deeming' provision places on the accused is unclear.⁴

* The broad interpretation of 'possession' adopted by the courts has led drug offences virtually into the realm of guilt by association.⁵ Hence, for instance, in *Twining v. Samuels*,⁶ the accused was convicted of possession on the basis of 'the possibility of access to the drug, evidence of past use, and the falsehood of the accused's testimony'.⁷

* Although strict liability has not been specifically incorporated into drug legislation, on some occasions it has effectively prevailed because of peculiar judicial

¹ Goode M. R., *Drugs and the Law* (Research Paper No. 7, Royal Commission into the Non-Medical Use of Drugs, South Australia, 1979) 1.

² *Ibid.* 154-5.

³ *Police Act 1892-1978* (W.A.) s. 94B(6) similar phrases are used in other States' legislation.

⁴ Goode, *op. cit.* 157.

⁵ *Ibid.* 40-1.

⁶ (1971) 2 S.A.S.R. 49.

⁷ Goode, *op. cit.* 40.

approaches to the requirement of *mens rea*.⁸ Goode maintains that a number of courts have denied the presence of a *mens rea* component in specific elements of particular offences, such as possession and knowledge of the nature of the substance, because of 'fervent community disquiet at the evil drug in question'.⁹ As one example, he cites the following statement of Taylor C.J., in *R. v. Rawcliffe*:¹⁰

There is not here a likelihood of innocent persons being in possession of narcotic substances which constitute the prohibited import not knowing what they are. It is highly improbable that people would have possession of this substance without knowing what it is.¹¹

* The principle that statutes creating offences which are superimposed upon the common law will be interpreted in favour of the liberty of the individual is regularly contravened. Goode argues on the basis of his analysis of Australian drug cases that this principle has not only been widely ignored, but has effectively been reversed by Australian courts in the field of drug law.¹²

* Certain Commonwealth drug legislation breaches the guarantee of trial by jury in section 80 of the Constitution.¹³ In *Beckwith v. The Queen*,¹⁴ Murphy J. suggested that the legislative scheme in section 235(6) and (7) of the Customs Act 1901-1977 (Cth), in that it provides for summary trial of certain offences and contains an inbuilt mechanism impelling the defendant to accept such procedure, was unconstitutional.

Perhaps not surprisingly, Goode concludes that 'the present law . . . contravenes almost every basic assumption, principle or rule underlying the general criminal process developed by that process for the protection of the liberty of the citizen from arbitrary State action and the protection of the innocent from unjust prosecution'.¹⁵

The criticisms made by Goode are illustrated by reference to numerous judicial and legislative examples. The mere act of buying a small amount of cannabis for a friend has been held to constitute trafficking: *Falconer v. Pederson*.¹⁶ On an occasion when the substance involved was found during the trial to be something quite different, though still illegal, the trial judge simply amended the charge whilst proceeding to convict the accused: *Twining v. Samuels*.¹⁷ Upon discovering that, because of a drafting error, only one of the three cannabis genera had been proscribed, courts in two States have held that Parliament nevertheless intended to proscribe all three and, therefore, that all three genera were thus proscribed.¹⁸ In order to determine whether such drugs as LSD, Mescaline, Palfium, Mandrax, and Codeine are illegal in South Australia, it is necessary to wade through a mountain of *Government Gazettes* dating back to 1969 to uncover the relevant proclamations.¹⁹ According to Goode's analysis of case law, it would appear that an individual may be convicted of possession of a minute, albeit scientifically detectable amount of cannabis or other illicit drug, and that a non-user who passes a 'joint' from one user to another is *prima facie* guilty of trafficking.²⁰

Aside from the more controversial and spectacular aspects of the law relating to illicit drugs, there remains a large body of substantive issues of a most complex nature. Goode discusses for example, recent cases which are inconsistent with the exception to the hearsay rule on expert evidence (leading to the conviction of the

⁸ *Ibid.* 52-3.

⁹ *Ibid.* 52. As examples, Goode cites *Lockyer v. Gibb* [1967] 2 Q.B. 243, and *R. v. Peel* [1971] 1 N.S.W.L.R. 247 and comments pointedly, 'Many other authorities are riddled with such nonsense', Goode, *op. cit.* 79, n. 30.

¹⁰ [1977] 1 N.S.W.L.R. 219.

¹¹ *Ibid.* 227.

¹² Goode, *op. cit.* 2.

¹³ *Ibid.*

¹⁴ (1977) 51 A.L.J.R. 247, 254.

¹⁵ Goode, *op. cit.* 1.

¹⁶ [1974] V.R. 185.

¹⁷ (1971) 2 S.A.S.R. 44.

¹⁸ *Reid v. Kerr* [1974] 9 S.A.S.R. 367; *Boyd v. Torney* [1977] V.R. 479.

¹⁹ Goode, *op. cit.* 15.

²⁰ *Ibid.* 115 f.

accused on the basis of inexpert admission evidence only).²¹ He provides a very thorough analysis of such complicated questions as the nature of the *mens rea* element in the so-called 'container cases' — cases where the accused has been found in possession of a closed container with a quantity of an illegal substance contained therein.²² The 'over-reach' inherent in statutory trafficking offences, which has the bizarre effect of encompassing much of common 'user' behaviour within the ambit of the definition of trafficking, is examined methodically, the author concluding that this over-reach allows police to extort plea-bargained guilty pleas with respect to lesser offences in return for abandoning trafficking charges, in situations where the accused has not engaged in trafficking at all or indeed is completely innocent of any charge.²³

Nevertheless, the report does have several weaknesses. For example, there is no analysis of 'smoking' or 'using' offences, which would appear to contain a number of specific problems themselves. Nor is there any investigation of sentencing tendencies and practices. It is one thing to know that a number of individuals have been unjustly convicted of drug offences, but a true representation of the situation cannot be obtained without a corollary examination of the consequences of such convictions. Certain of Goode's omissions may be explained by the fact that his report is one of a series: thus it could be surmised that material relating to police procedures of detection, arrest, seizure and prosecution will be found in the second report in the series, *Drug Prosecutions in South Australia*.

Ultimately, Matthew Goode's report is a disturbing one. It highlights an array of quite bizarre and extreme practices and interpretations which have as yet failed to attract substantial debate within the legal profession. It is reasonable to suggest that if any other area of the criminal law were involved a report of this nature would have the bulk of the legal fraternity demanding action and reform in the most vigorous manner conceivable. Unfortunately, with the exception of a handful of practitioners who have become expert in the field and contributed a good deal to the development of the law in this area, it has been largely ignored. Now, however, with the sudden proliferation of Government investigations into illicit drug use, the continuing rise in use, detection, and popular reaction, the legal profession is no longer able to justify its continued quiescence. It is to be hoped that Goode's report, and other rational investigations of drugs and the law in Australia, will have a direct, beneficial effect on lawyers and legislators.

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²¹ *Anglim and Cooke v. Thomas* [1974] V.R. 363; *R. v. Pfitzner* (1977) 73 L.S.J.S. 9 (S.A.).

²² Goode, *op. cit.* 58-66.

²³ *Ibid.* 126-32.

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